

**U.S. Department of Labor**

Office of Administrative Law Judges  
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DATE: January 29, 2001

CASE NO.: 1999-LHC-2740  
1999-LHC-2741

In the Matter of:

JAMES RIGGI  
Claimant

v.

CONSOLIDATION COAL COMPANY  
Employer

and

DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS  
Party in Interest

**DECISION AND ORDER - AWARDING BENEFITS**  
**AND GRANTING SECTION 8(f) RELIEF**

This case arises from a claim for compensation under the Longshore and Harbor Worker's Compensation act, as amended, (33 U.S.C. § 901 *et seq.*), herein referred to as the "Act" and the implementing regulations, 20 C.F.R. parts 701 and 702. A hearing was held before the undersigned on June 2, 2000 in Pittsburgh, Pennsylvania. Notice was given to all interested parties. At the hearing, the only issue raised was that of the Employer's request for Special Fund relief pursuant to §8(f) of the Act. Employer's exhibits (EX) A-EE, and Claimant's exhibits (CX) 1-54, were admitted to the record without objection. An appearance by Catherine Oliver Murphy was entered as counsel for the Director, Office of Workers' Compensation Programs ("OWCP"), who submitted a post-hearing brief for closing argument. Post hearing briefs were also submitted by the Employer and Claimant.

**STIPULATIONS**

The parties stipulate and I find:

- A. Claimant has been employed by Consolidation Coal Company since January 3, 1989.
- B. On April 15, 1990, Claimant began a temporary assignment as a Dockman for Consolidation at its Dilworth Harbor, and on February 23, 1994 this became his permanent position.
- C. Claimant sustained several work-related injuries:
  - i. On August 2, 1994, Claimant sustained a work-related injury, described as a “strain to his left shoulder,” when his foot slipped while he was stepping from one barge to another, causing him to fall between the barges. (CX-25).
  - ii. On April 30, 1997, Claimant sustained a work-related injury, described as “thigh contusions - both right and left,” when a sideline broke while he was wiring two barges together, striking him across both thighs. (CX-1).
  - iii. On June 15, 1997, Claimant sustained a work-related injury, described as an “injury to right iliopsoas muscle, groin and low back,” when, while pulling large heavy cable, he felt a sharp pain in his right groin and lower back which radiated into his right leg and right foot. (CX-9, CX-16).
  - iv. On December 30, 1997, Claimant sustained a work-related injury, described as a “recurrence” of his April 30, 1997 injury, when, while pulling a large cable at work, he experienced pain in his groin area and low back.
- D. The aforesaid injuries occurred during the course and scope of Claimant’s employment with Consolidation and an employer-employee relationship existed at the times of the aforesaid injuries.
- E. Claimant gave timely notice of the injuries to Consolidation.
- F. The aforesaid injuries are within the purview of the Longshore and Harbor Workers’ Compensation Act.
- G. Claimant received benefits, for temporary total disability, at the rate of \$605.72 per week, based upon an average weekly wage of \$908.58 per week, these benefits being paid, pursuant to Payment of Compensation without Award, from August 3, 1994 through May 3, 1996, and returned to work, as a dockman, on May 4, 1996, and continued working at that position through April 30, 1997.
- H. Claimant received benefits, for temporary total disability, at the rate of \$801.06 per week, based upon an average weekly wage of \$1,233.56 per week, these benefits being paid, pursuant to Payment of Compensation without Award, from May 1, 1997 through May 16, 1997, and returned to work, as a dockman, on May 17, 1997 and continued working, at that position through June 16, 1997.
- I. Claimant received benefits, for temporary total disability, at the rate of \$801.06 per week, based upon an average weekly wage of \$1,233.56 per week, these benefits being paid,

pursuant to Payment of Compensation without Award, from June 16, 1997 through July 15, 1997, and returned to work as a dockman, on July 16, 1997, and continued working at that position through July 23, 1997.

- J. Claimant received benefits, for temporary total disability, at the rate of \$801.06 per week based upon an average weekly wage of \$1,233.56 per week, these benefits being paid, pursuant to Payment of Compensation without Award, from July 24, 1997, through September 1, 1997, and returned to work as a dockman, on September 2, 1997, and continued working at that position through January 7, 1998.
- K. Claimant received benefits for temporary total disability, at the rate of \$801.06 per week, based upon an average weekly wage of \$1,233.56 per week, these benefits being paid, pursuant to Payment of compensation without Award, from January 8, 1997, through and including the present.
- L. On June 19, 1999, based upon the combined residuals of the aforesaid injuries and the reports of Paul S. Lieber, M.D., Consolidation filed an Application for Limitation of Liability under Section 8(f) of the Act, 33 U.S.C. § 908(f) with the District Director, Philadelphia Compensation District.
- M. Consolidation's 8(f) Application contended that Claimant presents with a permanent disability, either total or partial, this permanent disability being materially and substantially greater than any disability existing as the result of the incident occurring at work on December 30, 1997 and resulting from a combination of a permanent partial disability attributable to the incidents occurring at work on August 2, 1994 and June 16, 1997, and of the permanent partial disability resulting from the most recent injury sustained, by him, on December 30, 1997.
- N. By letter dated July 6, 1999, the Office of the District Director denied Consolidation's application.
- O. In that denial, the Office of the District Director agreed that, while employed by Consolidation, Claimant sustained an August 2, 1994 injury involving his left shoulder and left upper extremity and that said injury is a pre-existing permanent partial disability within the meaning of Section 8(f) of the Act.
- P. The Office of the District Director further agreed that this pre-existing permanent partial disability was actually known to consolidation.
- Q. The District Director denied Consolidation's application on the grounds that Consolidation had failed to establish the current "cumulative result" criterion necessary for Special Fund Relief under Section 8(f).

#### ISSUE

The only unresolved issue presented by the Employer and Claimant at the June 2, 2000 hearing was whether Employer is entitled to Section 8(f) relief. In addition, the date of Maximum Medical Improvement is in dispute. Due to the non-participation of the Director at the hearing, the above listed stipulations are not binding on the Special Fund and as such, the entire case is in issue. Case law is clear that the trier-of-fact must examine all aspects of entitlement based on the recorded evidence before addressing Section 8(f). *Brady v. J Young & Co.*, 17 BRBS 46 (1985), aff'd on reconsideration, 18 BRBS 167 (1985) cited with approval in *Gupton v. Newport News Ship Building and Dry Dock Co.*, 33 BRBS 94 (1999). Nevertheless, stipulations between Employer and Claimant regarding facts which affect 8(f) may be accepted by the trier-of-fact if the stipulations are supported by substantial evidence in the record. *Phelps v. Newport News Ship Building and Dry Dock Co.*, 16 BRBS 325 (1984).

### FINDINGS OF FACT

Claimant, James Riggi, is a forty-nine year old man living in Greene County, Pennsylvania. He began working for the employer as a laborer after graduating from highschool in 1971. (TR 20-21). On December 30, 1997, while Claimant was employed as a dockman, he injured his back while pulling a cable. Prior to this injury, Claimant had numerous previous work-related injuries.

#### Claimant's August 2, 1994 Injury

On August 2, 1994, the Claimant injured his left shoulder, knee and head when he fell between two barges. (TR-30). The Claimant finished his shift but was off of work for fourteen months after the injury. (TR-53). The Claimant initially went to see Dr. Falor who is a panel physician for Consolidation and was referred to Dr. Imbriglia. (TR-55). By Employer's request, Claimant also went to see Dr. Lieber, who is board certified in physical medicine and rehabilitation, for an independent medical examination and evaluation on June 30, 1995. Dr. Lieber causally related Claimant's impairment to the August 2, 1994 injury. Both Drs. Imbriglia and Lieber recommended surgery. (TR-55). Dr. Imbriglia performed an arthroscopy of the Claimant's left shoulder with an open acromioplasty and biceps tendon decompression on October 31, 1994. (CX-31). Although the shoulder pain continued, the Claimant returned to full duty work as a dockman on May 4, 1996. (TR-55). The Claimant continued to have difficulties with his left shoulder and Dr. Imbriglia performed left shoulder acromioplasty, distal clavicle resection on October 16, 1998. (CX-54).

#### Claimant's April 30, 1997 Injury

On April 30, 1997, the Claimant was struck on the thighs by a cable that had snapped, causing him to fall on his back. (TR-26). The Claimant was treated in the Emergency Department of Greene County Hospital where he was diagnosed with contusions of both thighs and was referred to see Dr. Hennessey, a panel Doctor for Consolidation. (TR-26, TR-60). The Claimant was off work from May 1, 1997 to May 16, 1997, during which time he received temporary total benefits. The Claimant then went back to work as a dockman from May 16, 1997 until June 15, 1997, when he was injured again. (TR-61).

### Claimant's June 15, 1997 Injury

On June 15, 1997, the Claimant's injured his back and groin when lifting a fifty-five gallon drum. (TR-24). The Claimant testified that the pain wrapped around to his groin and he fell to the ground. (TR-24). The Claimant went to the Emergency Department of Greene County Memorial Hospital and was diagnosed with a strain to the right groin and was referred to see Dr. Hennessey. (EX-S). Dr. Hennessey noted tenderness at the right pubic synthesis and diagnosed the Claimant with right rectus abdominal muscle strain. (EX-T). The Claimant was released to work on July 16, 1997. (TR-62). Claimant received benefits for temporary total disability from June 16 up through July 15, of 1997. (TR-63).

On July 23, 1997, while pulling a cable at work, Claimant felt pain in his back and abdomen and his left leg went numb and his right leg gave out causing him to fall. (TR-22). On July 24, 1997, the Claimant went to see Dr. Kozakowicz, who is in the same practice group, Pennsylvania Physical Medicine, Inc., with Dr. Hennessey, complaining of an exacerbation of the June 16, 1997 injury. (EX-T). Dr. Kozakiewicz diagnosed a right iliopsoas strain and recommended a formal physical therapy program due to the fact that the Claimant had experienced six weeks of symptomology. (EX-T). On August 28, 1997 Dr. Kozakiewicz performed a follow up examination and found that the iliopsoas strain was largely resolved. (EX-T). Dr. Kozakiewicz released the Claimant to return to work on September 2, 1997. (TR-64). Claimant continued to work up until December 30, 1997, when Claimant again injured his back pulling on a cable. (TR-22).

### Claimant's December 30, 1997 Injury

On December 30, 1997, Claimant sustained an injury while pulling on a cable. Claimant testified that when he went to pull on the cable, he felt pain in his back, stomach, and legs, which caused him to fall over onto the barge. (TR-21). Claimant testified that he was able to finish his shift, but that the pain got worse with time. (TR-22). As a result of this injury, Claimant went to see Dr. Kozakiewicz, the Employer's physician, on January 8, 1998. (TR-64). Dr. Kozakiewicz examined the Claimant and noted that he had been working despite his reported persistent difficulty with discomfort in the right hip and gluteal region and noted that the Claimant was experiencing intermittent pain and numbness in an L5 and S1 distribution. Dr. Kozakiewicz found that the Claimant's symptoms were suggestive of possible right hip pathology and possible LS nerve root compromise and referred Claimant for an MRI. (EX-T). The Claimant underwent an MRI of his lumbar spine which evidenced disc protrusion to the L3-4 and L5-S1, and disc bulge at the L4-5. (CX-15).

### Dr. Lieber

By deposition on March 23, 2000, Dr. Lieber, who is board certified in orthopaedic surgery, stated that he first saw the Claimant on June 26, 1995 for an Independent Medical Evaluation (IME) in relation to his August 2, 1994 shoulder injury. (EX-EE pg. 7). Dr. Lieber testified that at that time he had several diagnoses in regards to the Claimants August 2, 1994

shoulder injury. The first one was partial thickness tear involving the left rotator cuff with tendinitis and anterosuperior glenoid labral tear. The second diagnosis was status post left shoulder surgery including a left subacromial decompression with partial acromioplasty and biceps tendon decompression. The third was clinical evidence of left shoulder adhesive capsulitis. The fourth was possible persistent tear of the supraspinatus. (EX-EE pg. 12.). Dr. Lieber also stated that in his opinion the Claimant's shoulder diagnoses were causally related to the incident occurring at work on August 2, 1994 and that at that time he did not think that his disability was total nor did he consider it to be permanent. (EX-EE pg. 12).

Dr. Lieber testified that he saw Claimant a second time on June 29, 1998 again for the purpose of performing an Independent Medical Evaluation. Dr. Lieber testified that he was instructed to evaluate Claimant with respect to his April 30, 1997 injury affecting his bilateral thighs, and not to evaluate him for injuries occurring subsequent to the April 30, 1997 thigh injury. (EX-EE pg. 14). Dr. Lieber testified that he conducted a physical examination and found that Claimant had recovered from the April 30, 1997 injury to his thighs, but that the Claimant had effects from the injury suffered on June 15, 1997, which he was not specifically asked to evaluate. (EX-EE pg. 15). Dr. Lieber testified that from that examination he "suspect[ed] that on June 15, 1997 [the Claimant] herniated his L5-S1 disc in the right lateral recess and that on December 30, 1997 he aggravated that disc herniation." (EX-EE pg. 21). Dr. Lieber also testified that it was his opinion at that time that the Claimant's L5-S1 disc herniation was causally related to the June 15, 1997 injury which had been worsened by the December 30, 1997 injury causing him to have an L5-S1 radiculopathy on the right-hand side. (EX-EE pg. 21).

Dr. Lieber testified that subsequent to the June 29, 1998 examination he had an opportunity to review additional records from Dr. Imbriglia's office regarding the Claimant's shoulder injury and that based upon medical record review he would not have anticipated any dramatic improvement in the Claimant's left shoulder condition at that time. (EX-EE pg. 22). Finally, Dr. Lieber testified that it was his opinion that the Claimant had reached MMI with regard to the back and shoulder conditions as of the June 29, 1998 IME. (EX-EE pg. 22).

Dr. Lieber performed a third IME on December 2, 1999. (EX-DD). In conjunction with performing this Independent Medical Re-evaluation, Dr. Lieber reviewed previous IME reports, Dr. William Mitchell's records, Physical therapy notes from August 1998 through October 1998, and a Social Security Disability Award. Dr. Lieber testified that at this time the injuries related to the left shoulder, the thigh contusion and the back injury had been accepted as work-related and he could therefore evaluate the Claimant comprehensively. (EX-EE pg. 24). In this examination Dr. Lieber found that the thigh contusion injury had been resolved. However, he also found that the left shoulder problem appeared to be persistent and worse than it had been when previously evaluated. (EX-EE pg. 25). Dr. Lieber found that the Claimant's back condition had also worsened. (EX-EE pg. 26). Dr. Lieber said that the back problem and the left shoulder problem combined rendered the Claimant totally disabled. (EX-EE pg. 30).

#### Dr. Imbriglia

The Claimant initially treated with Dr. Falor after his August 2, 1994 shoulder injury. Dr.

Falor referred the Claimant to the Pennsylvania Center for Surgery of the Hand and Orthopaedic Surgery for a surgical consult with Dr. Imbriglia, who is board certified in orthopaedic surgery on September 13, 1994. (EX-G).

Initially Dr. Imbriglia diagnosed a labral tear with some rotator cuff tendinitis from the injury and recommended physical therapy. Because the Claimant's shoulder injury did not improve, Dr. Imbriglia performed a left shoulder exploration arthroscopy, left subacromial decompression with partial acromioplasty and biceps tendon decompression on October 31, 1994. (EX- I). The Claimant returned to work on May 4, 1996. (EX-L).

The Claimant began treating with Dr. Imbriglia again on April 17, 1997 because of continuing left shoulder pain. Dr. Imbriglia ordered a Functional Capacity Evaluation (FCE) which was performed on April 28, 1997. This evaluation revealed that although the Claimant was working full duty, he did so with pain and was only capable of medium duty work. (CX-36). On October 16, 1998, Dr. Imbriglia performed a second surgery, left shoulder acromioplasty and distal clavicle resection at Allegheny General Hospital. (EX-N).

On March 2, 1999, Dr. Imbriglia performed a Functional Capacity Evaluation to identify updated functional work capacity levels. (EX-O). Dr. Imbriglia noted that the Claimant was suffering from left shoulder pain, A-C joint arthritis, bilateral CTS, and right knee pain as well as a central disc protrusion at L3-4, far right lateral disc protrusion at L5-S1, and a bulging disc at L4-5. In the FCE Summary, Dr. Imbriglia opined, "while his shoulders have not improved, his back has become substantially worse and is very limiting in material and non-material handling task performance. Further surgical considerations may be a factor in his eventual outcome, but in my opinion he is permanently unable to perform the duties of his previous job as a riverman." (EX-O).

#### Dr. Mitchell

The Claimant began receiving treatment with Dr. Mitchell, who is board certified orthopaedic surgery, on January 22, 1998 for complaints of pain in the low back and right leg area. (CX- 16-19). Dr. Mitchell rendered the diagnoses of disc herniation, right L5-S1, central disc protrusion, L3-L4, lumbar radiculopathy, and facet arthroscopy, L5-S1 right and reported that in his opinion, these were a direct result of his work related accidents. (CX-16).

On January 22, 1998 Dr. Mitchell examined the Claimant Dr. Mitchell and opined that the Claimant was not capable of returning to his regular work. (CX-16). On February 23, 1998, Dr. Mitchell performed a facet block of the L5-S1 facet after the Claimant failed to improve with conservative treatment. According to the Claimant, this injection did not alleviate his discomfort. (CX-16-18).

On May 15, 2000, Dr. Mitchell reported that the Claimant continued to have pain in his back and leg on a regular basis which was compatible with clinical findings. Dr. Mitchell's report noted that, "[f]ormal therapy did not help him and it is my opinion at this time, with a reasonable

degree of medical certainty that the Claimant still remains totally and permanently disabled as a result of his work accidents of April 30, 1997 and June 16, 1997 and is not capable of returning to the employ of Consolidation.” (CX-17).

## DISCUSSION

### Maximum Medical Improvement

The Claimant and Employer stipulated to the fact that the Claimant sustained injuries on multiple dates, and that he is totally and permanently disabled as a result of those injuries. (TR-5). At the June 2, 2000 hearing, however, the Claimant and Employer presented conflicting dates of MMI. Counsel for the employer has set the MMI date at June 28, 1999, or earlier. (TR-14). Employer based this date on Dr. Lieber’s testimony at his March 23, 2000 deposition that the Claimant reached MMI with regard to the back and shoulder conditions as of June 28, 1999. (EX-EE pg. 22). The Claimant presented March 2, 1999 as the date of MMI based on a Functional Capacity Evaluation (FCE) performed by Dr. Imbriglia on March 2, 1999. (TR-15).

In a brief submitted on September 15, 2000 for closing argument, the Director argued that the only date on which the Claimant should be found to have reached MMI is December 2, 1999, based on the report of examination by Dr. Lieber conducted on that date. (EX-DD). In the brief, the Director also argued that there is no report which has been produced to the Director that indicates that Dr. Imbriglia ever stated that Claimant reached MMI on March 2, 1999.

Temporary disability converts to permanent disability at the time the injured employee reached Maximum Medical Improvement (MMI). *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 60 (1985); *Mason v. Bender Welding & Machine Co.*, 16 BRBS 307, 309 (1984). A disability will be considered permanent if the employee’s impairment has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5<sup>th</sup> Cir. 1968). The date of MMI is question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *Louisiana Insurance Guaranty Assoc. v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT) (5<sup>th</sup> Cir. 1994); *Ballestero v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988). The date of MMI is defined as the date on which the employee has received the maximum benefits of medical treatment such that her condition will not improve. *Manson v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984).

The Claimant has presented the date of March 2, 1999 as appropriate for MMI based on a Functional Capacity Evaluation (FCE) report by Dr. Imbriglia dated March 2, 1999. (TR-15). Dr. Imbriglia began treating the Claimant for his shoulder injury on September 13, 1994. (EX-G). Dr. Imbriglia performed surgery on Claimant’s shoulder on October 31, 1994 and again on October 16, 1998. (EX-N). On March 2, 1999, Dr. Imbriglia performed a Functional Capacity Evaluation to identify updated functional work capacity levels after having performed the second surgery on the Claimant’s left shoulder. (EX-O). Dr. Imbriglia noted that the Claimant was suffering from left shoulder pain, A-C joint arthritis, bilateral CTS, and right knee pain as well as a



central disc protrusion at L3-4, far right lateral disc protrusion at L5-S1, and a bulging disc at L4-5. In the FCE Summary, Dr. Imbriglia opined, “while his shoulders have not improved, his back has become substantially worse and is very limiting in material and non-material handling task performance. Further surgical considerations may be a factor in his eventual outcome, but in my opinion he is permanently unable to perform the duties of his previous job as a riverman.” (EX-O). This report was signed by the evaluator, Bob Irwin, OTR/L, CHT, as well as Dr. Imbriglia.

The District Director noted that this Functional Capacity Evaluation was not signed by Dr. Imbriglia but that his signature was visibly rubber-stamped and that Dr. Imbriglia’s notes from the examination on March 2, 1999 only indicate that “Claimant had been put into a light-duty category with the FCE.” (CX-31).

The Board has held that where additional treatment to improve an employee’s condition is warranted, MMI has not yet been attained. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 60 (1985). Looking at Dr. Imbriglia’s examination notes, it is clear that the claimant’s reliance on the March 2, 1999 date of MMI is misplaced. On January 12, 1999, Dr. Imbriglia’s notes state that “he is making some improvement and will continue in physical therapy.” On March 2, 1999, his notes state that the Claimant was, “put into light duty category with the FCE,” and should return for a follow up exam in three months.” In addition, the March 2, 1999 FCE indicates that the Claimant was continuing with physical therapy. (CX-54). On May 25, 1999, Dr. Imbriglia noted that the claimant would have to “live some of the aches and pains,” and again instructed the Claimant to return for a follow up examination. On August 17, 1999, however, Dr. Imbriglia notes that Claimant is “presently disabled from doing manual type labor,” and Dr. Imbriglia does not recommend additional treatment. (CX-31). Due to the fact that Dr. Imbriglia continued his recommendation for physical therapy and follow up visits beyond March 2, 1999, that date cannot be considered the date of MMI. Instead, August 17, 1999 is the first date where the record indicates MMI can be set in accordance with Dr. Imbriglia’s medical notes and records.

The Employer maintains that June 29, 1999 is the date of MMI based on the testimony of Dr. Lieber. By deposition on March 23, 2000, Dr. Lieber stated that he first saw the Claimant on June 26, 1995 for an Independent Medical Evaluation (IME) in relation to his shoulder injury and that at that time he did not think that his disability was total nor did he consider it to be permanent. (EX-EE pg. 12).

Dr. Lieber testified that he saw Claimant a second time on June 29, 1998 for the purpose of performing an IME to evaluate Claimant with respect to his April 30, 1997 injury affecting his bilateral thighs. (EX- EE pg. 14). Dr. Lieber testified that he conducted a physical examination and found that Claimant had recovered from the April 30, 1997 injury to his thighs, but that the Claimant had effects from the injury suffered on June 15, 1997, which he was not specifically asked to evaluate. (EX-EE pg. 15).

Subsequent to the June 29, 1998 examination Dr. Lieber reviewed additional records from Dr. Imbriglia’s office regarding the Claimant’s shoulder injury in order to clarify the extent of the Claimant’s injuries in a supplemental report to the June 29, 1998 IME, which is dated June

28,1999. In the addendum report, Dr. Lieber states that claimant's back and shoulder conditions had reached MMI. (EX-AA pg. 2).

The District Director argues that in consideration of the limited scope of the June 29, 1998 IME, it was not until the report of December 2, 1999, that Dr. Lieber finally states without equivocation that Claimant is, "fully and completely and permanently disabled." (EX-DD pg. 5). The Director bases this argument on the June 28, 1999 supplemental IME where Dr. Lieber states that Claimant's back injury "appears to be permanent" and "due to the recent surgery, the permanence of Claimant's left shoulder could not be established." (EX-AA pg. 2-3). In addition, the Director notes that in his deposition, "Dr. Lieber admits that he did not examine Claimant's left shoulder at all prior to his June 28, 1999 addendum report and did not consider Claimant's back injury or left shoulder injury prior to December 2, 1999, because they had not yet been accepted as work injuries at that time." (EX-EE pgs. 18, 23, 24).

Dr. Lieber performed a third IME on December 2, 1999. (EX-DD). In conjunction with performing this IME, Dr. Lieber reviewed previous IME reports from Dr. Imbriglia's examinations, Dr. William Mitchell's records, Physical therapy notes from August 1998 through October 1998, and a Social Security Disability Award. Dr. Lieber testified that at this time the injuries related to the left shoulder, the thigh contusion and the back injury had been accepted as work-related and he could therefore evaluate the Claimant comprehensively. (EX-EE pg. 24). In this examination Dr. Lieber found that the August 2, 1994 thigh contusions had been resolved. However, he also found that the left shoulder problem appeared to be persistent and worse than it had been when previously evaluated. (EX-EE pg. 25). Dr. Lieber found that the Claimant's back condition had also worsened. (EX-EE pg. 26). Dr. Lieber opined that the back problem and the left shoulder problem combined rendered the Claimant totally disabled. (EX-EE pg. 30). Thus, at the time of the June 28, 1999 addendum report, Dr. Lieber's report and deposition testimony do not conclusively establish MMI. It is not until the December 2, 1999 examination and report that Dr. Lieber's examination and report establish that the Claimant would not benefit from further treatment and that the Claimant is permanently unable to perform the duties of his previous job.

Claimant began treatment with Dr. Mitchell, an orthopaedic surgeon, on January 22, 1998. On May 15, 2000, Dr. Mitchell's report stated that, "[f]ormal therapy did not help him and it is my opinion at this time, with a reasonable degree of medical certainty that the Claimant still remains totally and permanently disabled as a result of his work accidents of April 30, 1997 and June 15, 1997 and is not capable of returning to the employ of Consolidation." (CX-17).

I find that Claimant's medical records demonstrate extensive and continuing problems with both his shoulder and his back. Additionally, Drs. Imbriglia, Lieber and Mitchell have unequivocally stated that Claimant has reached MMI. In sum, however, it is not until August 17, 1999 that an MMI date can be established. Dr. Mitchell does not report MMI until May 15, 2000, yet at that time he stated that the Claimant, "remains," permanently disabled. Drs. Imbriglia and Lieber do not unequivocally state that Claimant has reached MMI until August 17, 1999, and December 2, 1999, respectively. Because I find there is no evidence of expected improvement in Claimant's condition after Dr. Imbriglia's August 17, 1999 examination, and in

the absence of credible evidence to the contrary, I find that the date of MMI is August 17, 1999.

### Section 8(f) Relief

Section 8(f) shifts part of the liability for permanent partial and permanent total disability and death benefits, from the employer to the Special Fund when the disability or death is not due solely to the injury which is the subject of the claim. To qualify for 8(f) relief, an employer must make a three-part showing that (1) Claimant has a pre-existing permanent partial disability before the most recent employment injury; (2) the pre-existing disability was manifest to Employer; and (3) depending on whether the present disability is total or partial, (a) the current permanent total disability was not solely due to the most recent employment injury; or, (b) the current permanent partial disability is “materially and substantially greater than that which would have resulted from the subsequent injury alone” without the contribution of the preexisting permanent partial disability. *Two “R” Drilling co., Inc. v. Director, OWCP*, 894 F.2d 748, 750 (5<sup>th</sup> Cir. 1990); *Director, OWCP v. Newport News Shipbuilding*, 8 F.3d 175 (4<sup>th</sup> Cir. 1993); *Lawson v. Swanee Fruit and Steamship Co.*, 336 U.S. 198 (1949); *McDuffie v. Eller & Co.*, 10 BRBS 685 (1979).

A pre-existing permanent partial disability can be 1) a scheduled loss under Section 8(c) of the Act; 2) an economic disability arising out of a physical infirmity; or 3) a serious physical disability which would motivate a cautious employer to dismiss a Claimant because of a greatly increased risk of an employment-related accident and compensation liability. *C & P Telephone Co. v. Director OWCP*, 564 F.2d 503 (D.C. Cir. 1977). The fact that there has been a past injury does not itself establish disability. Rather, “there must exist, as a result of the injury some serious, lasting physical problem.” *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1145-6 (9<sup>th</sup> Cir. 1991).

It is clear from the documentation in Consolidation Coal Company’s records that Claimant has had many injuries while on the job. Most significantly the Claimant was injured on August 2, 1994, April 30, 1997, and June 15, 1997 prior to the December 30, 1997 injury. On June 19, 1999, the employer filed an Application for Limitation of Liability under Section 8(f) of the Act with the District Director based on the combined residuals of these injuries. The Employer and Claimant have stipulated and the Office of the District Director agreed that the August 2, 1994 injury involving Claimant’s left shoulder and left upper extremity is a pre-existing permanent partial disability within the meaning of Section 8(f). This injury to the left upper extremity was diagnosed by Dr. Imbriglia as a left shoulder impingement syndrome with bicipital tendinitis and partial rotator cuff tear. (EX-H). Due to this injury, Claimant received benefits for temporary and total disability from August 3, 1994 through May 3, 1996. (EX-L).

The accident which occurred on April 30, 1997, involved a cable which broke and snapped back, hitting the Claimant across the thighs and knocking him down. (TR-26). The Claimant was treated by Dr. Hennessey, a panel doctor for Consolidation, who diagnosed bilateral anterior thigh contusions, and prescribed home exercises and ice packs. (CX-11). Dr. Hennessey noted in his physiatric evaluation of May 1, 1997 that the Claimant did not have any weakness in his lower limbs, or any back pain. (CX-11). In his follow up exam on May 6 1997, however, Dr.

Hennessey did note that the Claimant had been experiencing an intermittent burning sensation in the right groin area proximal to the inguinal ligament and lateral to the pubic symphysis. (CX-11). One week later, on May 13, 1997, the Claimant went for a second follow up examination. Dr. Hennessey noted that the Claimant could return to work without restriction and that no further medical treatment was needed as the Claimant only needed time to finish healing. (CX-11). The Claimant received benefits for temporary total disability from May 1, 1997 until May 16, 1997. (TR-60). In an independent medical evaluation performed on July 17, 1998, Dr. Lieber opined that the Claimant recovered from this injury without any lasting residual effects and was able to return to his pre-injury level of work. (EX-Y). This injury was fully resolved long before the Claimant's final work related injury. Therefore this injury is not a pre-existing permanent partial disability within the meaning of the Act..

On June 15, 1997 the Claimant injured his back and groin. (CX-12). While lifting a 55 gallon drum the Claimant testified that his back gave out and pain wrapped around to his groin and he fell to the floor. (TR-23, 24). The Claimant was diagnosed as having a rectus abdominal muscle strain. (CX-13). On July 15, 1997, Dr. Hennessey performed a follow up examination. His impression was that the Claimant had mostly resolved the right lower abdominal muscle strain and could return to work without any physical restrictions. (CX-13). The Claimant received benefits for temporary total disability from June 16, 1997 until July 15, 1997. (TR-63).

On July 23, 1997, however, the Claimant experienced an exacerbation of his June 15, 1997 injury when he felt a stabbing pain in his back and abdomen while pulling on a cable. (TR-63). The Claimant testified that his left leg went numb and his right leg completely gave out, causing him to fall. (HT-22). The Claimant went to see Dr. Kozakiewicz, the employer's physician, on July 24, 1997 complaining that while his symptoms had not completely resolved from the June 15, 1997 accident at the time he returned to work, his return to work had worsened his symptomatology. (CX-13). The Claimant reported severe right anterior hip/inguinal region discomfort and pain in the anterior thigh. (CX-13). Dr. Kozakiewicz diagnosed the Claimant's injury as a right iliopsoas strain and recommended a formal physical therapy program due to the fact that the Claimant had experienced approximately six weeks of symptomatology. (CX-13). The Claimant received benefits for temporary total disability from July 24, 1997 through September 1, 1997. (EX-V). Dr. Kozakiewicz released the Claimant to return to work on September 2, 1997 and the Claimant continued working continuously until the day of the December 30, 1997 accident. (TR-64).

In addition to the August 2, 1994 injury satisfying the pre-existing disability requirement, I find that the injury which occurred on June 15, 1997 and was exacerbated on June 23, 1997, created a serious physical disability which would motivate a cautious employer to dismiss a Claimant because of a greatly increased risk of an employment-related accident and compensation liability. Common sense dictates that any cautious employer would have feared Claimant's June 15, 1997 pre-existing injury as well as his August 2, 1994 injury to the left shoulder and left upper extremity. The Claimant by all appearances seems to be exactly kind of worker for which 8(f) relief was designed in hopes of encouraging his employment despite pre-existing disabilities.

In order to obtain 8(f) relief, the employer must also establish that the pre-existing disability was manifest to the employer. Actual knowledge of the disability will satisfy the manifest requirement, as where a Claimant has been previously injured during his employment with the employer and received an award for permanent partial disability. *Director, OWCP v. Bethlehem Steel Corp.*, 868 F. 2d 759 (5<sup>th</sup> Cir. 1989); *aff'g in part, rev'g in part* 19 BRBS 200 (1987). The record establishes that the Employer paid permanent partial benefits for the August 2, 1994 injury, the April 30, 1997 injury the June 15, 1997 injury, and the June 30th exacerbation. (EX - L,U,V). In addition, it is uncontested that the injury was manifest to the Employer and the initial injury occurred at the Employer's workplace, disability benefits were paid, and the Employer has received various documentation and information regarding Claimant's medical treatment with various doctors.

The final element necessary for 8(f) relief requires the Employer to show that the current disability was not due solely to the latest employment injury. *Director, OWCP v. Newport News Shipbuilding*, 8 F.3d 175 (4<sup>th</sup> Cir. 1993); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748 (5<sup>th</sup> Cir. 1990). An employer must set forth evidence to show that a claimant's pre-existing permanent disability combines with or contributes to a claimant's current injury resulting in a greater degree of permanent disability. *Id.*

In his deposition, Dr. Lieber stated that the back problem and the left shoulder problem combined, rendered the Claimant totally disabled. (EX-EE pg. 30). Dr. Imbriglia, who On March 2, 1999, specifically performed a Functional Capacity Evaluation to identify the Claimant's updated functional work capacity level in consideration of both his shoulder and back injuries found that "while his shoulders have not improved, his back has become substantially worse and is very limiting in material and non-material handling task performance ... in my opinion he is permanently unable to perform the duties of his previous job as a riverman." (EX-O). Dr. Mitchell also found that the Claimant was permanently disabled due to the December 30, 1997 exacerbation of his previous injuries. (CX-16, CX-17).

While Claimant had continued working with his shoulder and back pain, it was not until the exacerbation on December 30, 1997, that Claimant's condition became permanently disabling. The record supports the conclusion, which I adopt, that Claimant's permanent disability is not due solely to his December 30, 1997 injury. Every physician who provided a medical opinion recognized Claimant's pre-existing impairments created by earlier injuries and the exacerbation of these impairments. Moreover, it is fundamentally clear from reviewing the opinions of Drs. Lieber, Mitchell, Imbriglia, and Hennessey that Claimant's current condition and physical status was not caused by his December 30, 1997 injury alone.

Therefore, based on the medical reports and records in evidence, and in the absence of

credible evidence to the contrary, I find and conclude that Employer has established the pre-requisites necessary for entitlement to Special Fund relief under the Act. Thus, Employer's request for Special Fund relief under Section 8(f) is hereby GRANTED.

### ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order.

1. Employer/Carrier's request for Section 8(f) relief is hereby GRANTED.
2. Employer/Carrier shall pay Claimant compensation benefits based upon an average weekly wage of \$1,233.56 for permanent total disability from August 17, 1999, these benefits to be paid for 104 weeks from that date.
3. After the expiration of 104 weeks, such compensation and adjustments shall be paid by the Special Fund established pursuant to the provisions of 33 U.S.C. §944.
4. Employer shall receive credit for all compensation that has been paid/or shall be reimbursed by the Special Fund for any overpayments of compensation that have been made.
5. Employer/Carrier remains responsible for Claimant's reasonable and necessary medical expenses, according to the provisions of Section 7 of the Act.
6. Employer/Carrier shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982).

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GERALD M. TIERNEY  
Administrative Law Judge

